

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

FINAL STATEMENT OF REASONS
(Subject Matter: Workers' Compensation – Audit Regulations
Title 8, California Code of Regulations Sections 10100.2 et seq.)

The Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 59, 129, 129.5, 133, and 5307.3 and Government Code Section 11346.8(c), has adopted following amendments to Title 8, California Code of Regulations:

Proposed section 10100.2	Definitions
Proposed section 10103.2	Claim Log – Contents and Maintenance
Amended section 10104	Annual Report of Inventory
Amended section 10105	Auditing, Discretion of the Administrative Director
Proposed section 10106.1	Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection
Amended section 10106.5	Civil Penalty Investigation
Proposed section 10107.1	Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure
Amended section 10108	Audit Violations – General Rules
Amended section 10109	Duty to Conduct Investigation; Duty of Good Faith
Proposed section 10111.2	Full Compliance Audit Penalty Schedule; Target Audit Penalty Schedule
Amended section 10113	Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing
Proposed section 10113.1	Answer to Order to Show Cause
Proposed section 10113.2	Amended Complaint or Supplemental Order to Show Cause Before Submission of Case
Proposed section 10113.3	Administrative Director's Designation of Hearing Officer
Proposed section 10113.4	Written Statement and Supporting Evidence
Proposed section 10113.5	Prehearing Conference; Subject Matter; Prehearing Order
Proposed section 10113.6	Subpoenas
Amended section 10114	Hearing
Proposed section 10114.1	Evidence; Examination of Witnesses
Proposed section 10114.2	Affidavits
Proposed section 10114.3	Oaths
Proposed section 10114.4	Determination
Amended section 10115.1	Appeal of Notice of Penalty Assessment – Filing and Contents
Repealed section 10115.3	Appeal of Civil Penalty

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code §11346.9(d), the Administrative Director incorporates the Initial Statement of Reasons prepared in this matter.

A.

The following sections were amended following the public hearing and circulated for a 15-day comment period.

Section 10100.2

Definitions

Section 10100.2 was modified to set forth that the definitions will apply “for audits conducted on or after January 1, 2003” instead of “for injuries occurring on or after January 1, 2003.” Because the definitions concern how the audits will be conducted, it is more appropriate for the terms to be effective on the same date of the implementing statutes, Labor Code sections 129 and 129.5. Section 10100.2(a) was modified in response to a comment to clarify that claims administrated at a “satellite office” will be considered part of the single adjusting location being audited. Section 10100.2(h) was modified to refer to the correct regulation, Section 10103.2, rather than Section 10103.1. Section 10100.2(p) was modified in response to comments that the handling of a single claim should not constitute a general business practice. The definition of a general business practice no longer includes separate acts or omissions in the handling of a single claim. The clarification of the definition of a general business practice is necessary so that the regulated community is aware of the type of conduct that may subject it to civil penalties. Prior cases as well as the comments evidence the fact that there is confusion within the regulated community regarding when the civil penalty is applicable. The definition will also decrease litigation concerning the application of the civil penalty for general business practices. Section 10100.2(r) was modified in response to comments that the California Insurance Guarantee Association (CIGA) does not fall within the definition of “an insurer.” Therefore, reference to CIGA was deleted.

Section 10106.1

Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection

This section describes the process for selecting a subject for an audit on or after January 1, 2003. Section 10106.1(2) was modified in response to comments that the section allows too much discretion. It was modified to refer specifically to Labor Code section 5814 penalty decisions or findings, and no longer contains reference to findings by the Rehabilitation Unit or other decisions that document claims administrator failures to meet their obligations. It was also modified to state that selection for target audit is based on a ratio of the Labor Code section 5814 penalties compared to the number of claims reported at the adjusting location. Section 10106.1(3) was modified to clarify that the Audit Unit will not base a target audit on an anonymous complaint unless the complaint is supported by credible evidence. Additionally, in response to comments that target audits should not be based on the discretion of the Audit Unit, the modifications require that once a year, the Audit Unit will compile a list of complaints and assign points based on the severity of the violation (one point for each \$100 in penalties

assessable pursuant to Sections 10111 and 10111.2) and based on credible complaints that indicate claims handling for which a civil penalty may be assessed.

Section 10106.5

Civil Penalty Investigation

Reference to Labor Code section 129.5(d) was corrected to refer to section Labor Code section 129.5(e). Also, in response to comments, language has been added that the Audit Unit shall report any suspected fraudulent activity uncovered during an audit or investigation to the appropriate law enforcing agencies.

Section 10107.1

Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure

Section 10107.1(c)(3)(C) was modified in response to comments requesting clarification that the profile audit review performance rating will be published in the Annual DWC Audit Reports. Also in response to comments, the section was modified to state that “written” notification showing the Audit Unit’s calculation of the profile audit review performance rating will be given to the audit subject in time for the timely filing of an objection. Section 10107.1(m) was modified in response to comments to clarify that the Audit Unit may request additional information or documentation more narrowly defined as “related to the claims being audited.” The section previously used the words, “related to claims handling.”

Section 10109

Duty to Conduct Investigation in Good Faith

Amended section 10109 added a definition of “acting in good faith.” Due to comments received stating that “good faith” should not be defined, the definition of ‘acting in good faith’ proposed in the amended section 10109 was deleted.

Section 10111.2

Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule

Section 10111.2 sets forth the audit penalty schedules in compliance with the new requirements of Labor Code section 129.5. Based on comments concerning the penalty for late first payments of benefits, Section 10111.2(a)(5), (6), (7), and (8) was modified to reflect higher penalties. Reference to Section 10108(c) and Section 10111.2(a)(2) and (a)(3) has also been added regarding penalty amounts for payments made over 30 days late. Section 10111.2(b)(4) has been also modified. The following language was deleted: “The claims administrator shall not be subjected to penalty under this subsection if it demonstrates by clear and convincing evidence that the backdating, alteration, or withholding of the document was due solely to unintentional clerical error.” This language was deleted in response to concerns regarding whether the audit subject could be required to bear the burden of proof.

Section 10113

Order to Show Cause re Assessment of Civil Penalty and Notice of Hearing

Section 10113(a) was modified by replacing the words “a claims administrator” with the words “an audit subject.” Additionally, Section 10113(b)(1) was modified in response to comments by replacing the words “adjusting location” with audit subject named in the order.” These changes

are made to clarify that the imposition of a civil penalty may be assessed on the audit subject (as defined by Section 10100.2).

Section 10113.3

Administrative Director's Designation of Hearing Officer

Section 10113.3 was modified in response to comments. It now clarifies that the Administrative Director may delegate authority to a "Workers' Compensation Administrative Law Judge" to act as the Hearing Officer.

B.

Following the 15-day comment period, no additional changes were made to the regulations.

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The amendments do not apply to any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: The regulations may impose discretionary costs on local agencies and school districts. Any such costs, however, will be non-discretionary because the requirement that every employer comply with the requirements of California's workers' compensation laws is a statutory obligation. Furthermore, any such costs are non-reimbursable because the requirement for employers to comply with California's workers' compensation laws is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California
- Other nondiscretionary costs/savings imposed upon local agencies: The proposed regulations may impose costs on State agencies. (State government accounts for about 3% of the occupational injuries and illnesses.) Any such costs are, however, are non-reimbursable since the requirement on an employer to comply with California's workers' compensation laws is not unique to State agencies and applies to all employers alike, public and private. Because the proposed regulations will (1) eliminate penalties for audit subjects that meet or exceed the profile audit review performance standards, and (2) provide for penalties to be assessed only for violations involving late-paid and unpaid compensation against those audit subjects that meet or exceed the full compliance audit performance standards, the proposed regulations may result in possible cost savings.

CONSIDERATION OF ALTERNATIVES.

The Division considered all comments submitted during the two public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they

be as effective and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the following charts.

The two public comment periods were as follows:

Initial 45-day comment period on proposed regulations:

July 26 through September 13, 2002.

15-day comment period on modifications to proposed text:

October 7 through October 23, 2002.